In the Matter of C.H., Police Officer (Special), City of East Orange
CSC Docket No. 2012-909
(Civil Service Commission, decided July 11, 2012)

C.H., represented by Jason J. LeBoeuf, Esq., appeals his removal from the special reemployment list for Police Officer, City of East Orange, and his separation from employment as a Police Officer, effective July 1, 2011, with the City of East Orange.

By way of background, the appellant, a veteran, was appointed as a Police Officer with the City of East Orange effective January 7, 2008. He was subsequently laid off from his position on February 1, 2011. The appellant was then placed on the special reemployment list for Police Officer, and shortly thereafter, the list was certified on May 13, 2011. The appointing authority noted that it had obtained a waiver to hire at least three Police Officers. The certification was due on November 14, 2011, but was returned earlier on August 24, 2011. The appellant was listed as the number one eligible on the certification. In disposing of the certification, the appointing authority removed the appellant's name due to a failed urinalysis examination and appointed the second and third ranked eligibles effective May 15, 2011. It also appointed the fourth ranked eligible effective June 20, 2011.

On appeal to the Civil Service Commission (Commission), the appellant explains that the appointing authority subjected him to a non-random urinalysis drug test on May 13, 2011. Pending the results of the drug test, the appellant was sworn in as a Police Officer on May 16, 2011, and returned to active duty. The appellant presented his written Oath of Allegiance and sworn statement to the City of East Orange dated May 16, 2011. On June 17, 2011, the appellant was notified that his urine tested positive for 11-Carboxy-THC (cannabinoids) at 15 ng/ml. In response, the appellant indicates that he attempted to provide the appointing authority with a list of "legal, over-the-counter substances that he believed that may have yielded the false positive" for marijuana. However, the appointing authority refused to accept the list, in violation of the Attorney General's Law Enforcement Drug Testing Policy (AG Guidelines). The appellant notes that he is an avid weight lifter and denies the use of any illicit substances. He certifies that "he [has] never smoked, inhaled, been in contact with or otherwise consumed marijuana in any form of which [he is] aware." The appellant was then "suspended without pay" on July 1, 2011. It is noted that the appellant was called to the Office of Professional Standards and was advised that he was being suspended from duty, pursuant to the AG Guidelines,[1] due to the positive test result for cannabinoids. A

[1] The AG Guidelines requires that when a sworn law enforcement officer tests positive for illegal drug use, the officer shall be immediately suspended from all duties and the officer shall be

union representative was present. The appellant was also served on July 1, 2011, with a notice, dated June 30, 2011, that due to the test result, he was immediately suspended "to maintain the safety, health, order and effective direction of public services" and was scheduled for a "*Loudermill*" hearing on July 6, 2012. The appointing authority states that the appellant provided the list of medications and supplements in the presence of his union representative.

The appellant challenges the results of the drug test and asserts that the appointing authority failed to follow the chain of custody procedures as outlined in the AG Guidelines and Law Enforcement Drug Testing Manual (Drug Testing Manual). Thus, he maintains that the test results should be disregarded. Furthermore, while the appellant is also challenging the removal of his name from the special reemployment list, he maintains that he was a permanent Police Officer[2] and not an applicant for employment. As such, he contends that he was entitled to a hearing on his separation from employment. He recounts his prior employment with the City of East Orange and his layoff. It is noted that while the appointing authority scheduled a pretermination, "*Loudermill*," hearing on July 6, 2011,[3] the appellant agreed to waive the hearing pending the decision on whether he was considered an applicant for employment or an employee. Nevertheless, he states that he never agreed to waive the hearing on his separation from employment. Further, the appellant indicates that while he was waiting for the hearing, he was notified on September 1, 2011, by this agency, that the appointing authority removed him from the special reemployment list.

Additionally, the appellant claims that the AG Guidelines and the Drug Testing Manual were violated because he was a sworn officer and could only be subjected to a random test or a "reasonable suspicion" test, neither of which was the case here. The appointing authority also failed to provide the appellant with the requisite consent and notification form as to the consequences of a positive test result. Moreover, the appellant argues that if he is considered an applicant for employment, then the appointing authority should have requested a medication information form after the positive test result. In addition, the appellant maintains that the test results did not meet the cut-off level for marijuana set forth in the Drug Testing Manual. Lastly, the appellant notes that there is no policy to address his situation, namely, how a laid-off officer is to be brought back to employment and

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terminated from employment as a law enforcement officer, upon final disciplinary action. AG Guidelines at VIII-C.

[2] *N.J.A.C.* 4A:1-1.3 provides that a permanent employee means an employee in the career service who has acquired the tenure and rights resulting from regular appointment and successful completion of the working test period.

[3] A "*Loudermill*," or pretermination hearing, is required pursuant to *N.J.A.C.* 4A:2-2.5 where an immediate suspension without pay is sought. The underlying basis for this procedural requirement stems from *Cleveland Board of Education v. Loudermill*, 470 *U.S.* 532 (1985).

classified. He asks that he "be given the inference of all doubt and returned to his position."

In response, the appointing authority, represented by Tracey L. Hackett, Assistant Corporation Counsel, admits that the appellant took his oath of office on May 16, 2011, and was allowed to work. However, it submits that the appellant's employment was conditioned upon his passing the drug test. Further, the appellant completed the Request for Personnel Action form, which specifically indicates that the appointment was "Subject to Approval by Appointing Authority." Moreover, the appointing authority indicates that all of the documents and facts in this case clearly demonstrate that the appellant was an applicant for employment when he took the drug test. For instance, the appellant signed the Law Enforcement Drug Testing Chain of Custody form which states that the purpose of the test was for "applicant testing." It also notes that until this agency approves the appointment from the special reemployment list, the appellant remains only an applicant for employment. It emphasizes that the appellant's appointment was not yet recorded in the County and Municipal Personnel System (CAMPS). Therefore, the appointing authority submits that the appellant was not an employee who would have been entitled to a hearing on his separation from employment. Thus, it states that a Preliminary Notice of Disciplinary Action (PNDA) could not be issued. Consequently, the "*Loudermill*" hearing was canceled on July 6, 2011, because the appellant was not a permanent employee. Instead, the appellant was properly removed from the special reemployment list for cause. The appointing authority notes that it did not dispose of the certification until the test results of the candidates were returned.

Moreover, the appointing authority indicates that in order to become a Police Officer, an applicant must pass a drug test. This holds true for a returning laid off Police Officer. Further, the appointing authority asserts that the East Orange Police Department followed the chain of custody procedures. It indicates that the appellant submitted two urine samples and he had the split sample tested. That sample also came back positive for marijuana. In addition, the appointing authority emphasizes that the appellant did not provide his list of medications and supplements at the time of his drug test on May 13, 2011. Thus, the appointing authority contends that the drug test should not be voided.

In response, the appellant objects to the appointing authority's submission as being untimely. He indicates that the parties were given 20 days to file their submissions, but it took the appointing authority almost two months after the appellant filed his additional papers to even request an extension to submit its response to the appeal. He states that the "obvious benefit" to the appointing authority is that it was able to reply directly to his submission, as opposed to having filed its response simultaneously with the appellant's submission. Therefore, the appellant requests that the appointing authority's response be disregarded, as it is

prejudicial to him. Moreover, he questions why the appointing authority did not place him on the Rice Bill list[4] if he is considered a laid off officer. He also reiterates that if the appointing authority classifies him as an applicant for employment, then it should have taken his list of medications and supplements after the test result was issued. As to the appointing authority's policy on the reemployment of laid off officers, the appellant contends that the appointing authority did not provide any supporting documents to validate this alleged policy. Further, he argues that the policy is in contravention with State law since the appointing authority did not place him and other laid off Police Officers on the Rice Bill list.[5] In addition, the appellant highlights the fact that the appointing authority failed to address his claim regarding the cut-off level for marijuana as outlined in the Drug Testing Manual.

The appointing authority responds that the appellant did not support his allegation with evidence that he was prejudiced by the additional time given to the appointing authority to respond to the appeal. Further, it maintains that the appellant was required to provide the list of medications and supplements before the drug test, not afterwards. Moreover, the appointing authority states that the "rest of [the appellant's] argument is nonsensical" since there is no cut-off level for marijuana. Further, it submits that it is the appellant's responsibility to apply for placement on the Rice Bill list. Nonetheless, the appointing authority contends that placement on the Rice Bill list is irrelevant since the appellant tested positive for marijuana and would have been removed from that list as well.[6]

In reply, the appellant clarifies that the appointing authority benefitted from "waiting a great deal of time" after he submitted his additional arguments to reply. He states that the benefit "is obvious and hardly warrants further elucidation." The appellant indicates that he remains unemployed. The appellant also restates that if he were a sworn officer, then he was required to list the medicines and supplements he was taking before the test. However, if he is an applicant for employment, as the appointing authority argues, then the list of medication and supplements can only be requested after testing. Further, the appellant emphasizes that the Drug Testing Manual clearly delineates a metabolite cut-off level. Moreover, the appellant certifies that he did in fact apply for placement on the Rice Bill list after

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[4] The reemployment program for certain law enforcement officers, known as the Rice Bill, permits a municipal Police Officer who has been laid off or demoted from a law enforcement title to a non-law enforcement title for reasons of economy or efficiency or related reasons within the last 60 months to be reemployed by a municipality or county. *See N.J.S.A.* 40A:14-180 and *N.J.A.C.* 4A:4-3.9(a).

[5] The appellant does not name the Police Officers or provide further details with regard to these claimed individuals.

[6] Personnel records do not indicate that the appellant's name was placed on the Rice Bill list. It is further noted that this agency determines a candidate's eligibility to be placed on the Rice Bill list, but there is no provision under Title 11A of the New Jersey Statutes or Title 4A of the New Jersey Administrative Code which affords candidates on the list with appeal rights regarding appointments.

being laid off in February 2011, but the appointing authority failed to forward the application to this agency for processing.

CONCLUSION

Initially, the appellant requests that the appointing authority's response to his appeal not be considered as it was filed beyond the 20 days provided to the parties to submit additional information. However, in order for the Commission to make a reasoned decision in the matter, the Commission must review a complete record. Further, there is no jurisdictional statutory timeline within which a party is required to respond to an appeal. The Commission can expand this time period or limit it depending on the case. Moreover, although the appellant asserts that the timeliness of the appointing authority's submission was prejudicial to him, he has had the opportunity to provide a response. *See e.g., In the Matter of Michael Compton* (MSB, decided May 18, 2005). Therefore, based on the foregoing, the appointing authority's response will be considered.

The initial issue in dispute is whether the appellant was a permanent employee or an applicant for employment at the time of his separation from employment on July 1, 2011. Pursuant to *N.J.A.C.* 4A:1-1.3, a permanent employee means an employee in the career service who has acquired the tenure and rights resulting from regular appointment and successful completion of the working test period. The appellant was appointed as a Police Officer on January 7, 2008. There is no dispute that he became a permanent employee, and upon his layoff on February 1, 2011, he was given special reemployment rights and placed on the special reemployment list for Police Officer, City of East Orange. In this regard, *N.J.A.C.* 4A:8-2.3(a) provides that a permanent employee shall be granted special reemployment rights based on the permanent title from which or he she has been laid off, demoted or displaced by job location. Further, *N.J.A.C.* 4A:8-2.1(c) provides that a special reemployment right means the right of a permanent employee, based on his or her permanent title at the time of the layoff action, to be certified for reappointment after the layoff action to the same, lateral and lower related titles.

However, the appointing authority argues that the appellant was an applicant for employment at the time of his separation, since he needed to pass the drug test as a condition of employment. It is permissible to administer a medical examination, which may include a drug test, upon the return of an employee as part of an updated background check. However, for the reasons set forth below, the appellant must be treated as a permanent employee. The appointing authority returned the appellant to work as a Police Officer on May 16, 2011, while the special reemployment list for Police Officer was in existence and during the processing of the certification of the list. The appellant was listed in the number one position on the certification. Thus, by virtue of the appellant's special reemployment rights, the appointing authority could have only appointed or

removed the appellant from the special reemployment list, but it chose to return him to active duty. *See e.g., In the Matter of Kelly McKenith, et al.* (MSB, decided February 9, 2005) (Certain laid off County Correction Officers returned to duty prior to the issuance of a special reemployment list and then terminated were found to have permanent status at the time of termination by virtue of their special reemployment rights).[7] It is of no moment that the appointing authority failed to enter the appellant's appointment in CAMPS. Whatever the reasons for the recordkeeping delay, the key facts are that the appellant was sworn into office and commenced police duties on May 16, 2011. Therefore, the Commission finds that the appellant's appointment from the special reemployment list was effective May 16, 2011, and he was a permanent employee at the time of his removal from employment. Accordingly, the appointing authority should have afforded the appellant the opportunity for a departmental hearing on the merits of the charges and issued him a PNDA and a Final Notice of Disciplinary Action. *See N.J.A.C.* 4A:2-2.5 and *N.J.A.C.* 4A:2-2.6.

The Commission notes, however, that there was a proper pretermination hearing, as the procedural requirement set forth in *N.J.A.C.* 4A:2-2.5(b) was met. This regulation provides that where the suspension is immediate and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. Although the appointing authority cancelled the "*Loudermill*" hearing, the record demonstrates that a meeting was held on July 1, 2011, where the appellant was advised that he was to be suspended from duty that day because of his positive drug test. He was also served with written notice and attempted to answer the charge with the list of his medications and supplements. Furthermore, the Commission finds that there was a sufficient basis to have immediately suspended the appellant. The seriousness of the charges cannot be ignored. Allowing a Police Officer charged with failing a drug test to remain working clearly would present a hazard to the public and other officers if permitted to remain on the job. The Commission is mindful that a Police Officer is a law enforcement officer who, by the very nature of his or her job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also In re Phillips,* 117 *N.J.* 567 (1990). Clearly, the AG Guidelines requires that when a sworn law enforcement officer tests positive for illegal drug use, the officer shall be immediately suspended from all duties. Therefore, the appellant's immediate suspension was amply justified.

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[7] For subsequent history, *see In the Matter of Richard Dey, Police Officer, Palisades Interstate Park Commission and Khalid Nash, Essex County* (MSB, decided May 18, 2005).

Further, the appellant is not entitled to reinstatement under the circumstances where there is a valid basis to have immediately suspended him, regardless of the appointing authority's failure to properly process his removal. The record demonstrates that the appointing authority believed in good faith, albeit incorrectly, that the appellant was only an applicant for employment. Rather, the appropriate remedy is to grant the petitioner a hearing at the Office of Administrative Law (OAL).[8] Where, as here, it is clear that the appointing authority's justification for removing the appellant is the positive drug test, which the appellant claims was a "false positive," it is best to refer this matter to the OAL where a full plenary hearing may be conducted before an Administrative Law Judge who will hear live testimony, assess the credibility of witnesses, and weigh all the evidence in the record. Moreover, since the appellant is being granted a *de novo* hearing, any procedural violations identified above are deemed cured. *See Ensslin v. Township of North Bergen*, *275 N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971). The appellant will have the opportunity to challenge the validity and the results of the drug test at the OAL. In addition, should the appellant be successful on the merits of the charges, he would be entitled to mitigated back pay from the first date of his immediate suspension on July 1, 2011, which shall be considered his removal date. Accordingly, the Commission orders that the matter of the appellant's removal be transmitted to the OAL for a hearing as a contested case.

As to the appellant's personnel records, it is ordered that the May 13, 2011, certification of the special reemployment list for Police Officer, City of East Orange, be corrected to reflect the appellant's appointment effective May 16, 2011. Additionally, the appellant's CAMPS record shall be amended to reflect his appointment via the special reemployment list, effective May 16, 2011, and his removal from employment effective July 1, 2011. Furthermore, with regard to the appellant's claim that he was not placed on the Rice Bill list, the Commission finds that the issue is moot. The appellant returned to employment through the special reemployment list on May 16, 2011.

ORDER

Therefore, it is ordered that the matter of C.H.'s removal from employment as a Police Officer with the City of East Orange, effective July 1, 2011, be referred to the OAL for a hearing as a contested case. It is further ordered that the personnel records of C.H. be amended to reflect the corrections noted in this decision.

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[8] The Commission could order a departmental hearing. However, there is little purpose in ordering a departmental hearing in this case. The underlying purpose of a departmental hearing is to ensure that appointing authorities possess sufficient justification for the imposition of disciplinary action and to afford employees the opportunity to contest disciplinary charges imposed against them.